

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

RECEIVED

TANGELA DAVIS BOSTON,

Plaintiffs,

v.

THE HARTFORD INSURANCE
COMPANY,

Defendants.

2007 JUL 20 A 11:31

DEBRA P. HACKETT, CLK
CIVIL ACTION NO. 1:07CV663-MEF
MIDDLE DISTRICT ALA

1:07CV663-mef

MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and (6), Federal Rules of Civil Procedure, Defendant, Property and Casualty Insurance Company of Hartford ("P&C") (incorrectly identified as "The Hartford Insurance Company" in the Complaint), files this Motion to Dismiss Plaintiff's claims for bad faith and any other causes of actions other than a possible under-insured motorist claim because: (1) the Plaintiff's claims for bad faith are absolutely barred pursuant to the governing law which requires statutory notice prior to filing such a claim and (2) Plaintiff's claims for bad faith and any claims for breach of contract are premature and are not ripe for adjudication. In support thereof, P&C states as follows:

1. This action arises out of an accident that occurred in Geneva County, Alabama. See Complaint at ¶¶ 3, 9, and 15. The accident was allegedly caused by the negligence of Joseph Christopher Myles and Jessica Dianna Reeves, who have not been named as Defendants in this matter. *Id.* at ¶¶ 3, 9, and 15. At the time of the accident, the Plaintiff was driving, with permission, a vehicle owned by Francis Davis. *Id.* P&C issued a policy of insurance to Ms. Davis that included underinsured motorist coverage. See Complaint at ¶¶ 2, 8, 14. The policy at

issue was delivered to Ms. Davis in Florida.¹ A true and correct copy of the declaration page of Policy No. 55PHH964253, is attached hereto as Exhibit A.

2. The Complaint seeks compensatory and punitive damages related to the Plaintiff's claim for benefits under the uninsured motorist provisions of the policy. Specifically, the Complaint states: "Defendant Hartford denied said claim or failed to seasonably act on said claim," which is a claim for bad faith. As stated above, the policy at issue is a Florida insurance policy and, thus, the claims for bad faith are governed by Florida law. The Eleventh Circuit has held: "A federal court in a diversity action is required to apply the laws, including principles of conflict of laws, of the state in which the federal court sits." *Colonial Life & Accident Ins. V. Hartford Fire Ins. Co.*, 385 F. 3d 1306, (11th Cir. 2004) (holding that bad faith claims sound in contract and are governed by the law of the state where the policy was issued.) Thus, Alabama's principles governing conflicts of law is determinative and mandates that Florida law governs interpretation of the policy at issue, including the Plaintiff's claims for bad faith. *Id.*, see also *Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co.*, 839 So. 2d 614, 616 (Ala. 2002).

3. The Plaintiff's bad faith claims against P&C are barred by Florida Statue, which requires: "As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed." F.S.A. §624.155 (3) (a). Further, §624.155 mandates that the notice be provided on the form prescribed by the Florida Department of Insurance and further delineates

¹ The Court may properly consider the policy, including the declaration page, when determining a motion to dismiss even though it was not attached to the Complaint. "[W]here the documents referred to in the motion are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal. *Orange Beach Development Group, L.P. v. Powers*, 2007 WL 1889814, *3, No. 07-0121-KD-B. (S.D. Ala. June 28, 2007) (citing *Wilchombe v. Teevee Toons, Inc.*, 2006 WL 1553939, *1 (N.D.Ga.2006) citing *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir.1997)).

the information that must be included in the notice. As the Florida Supreme Court has held: "[t]he sixty-day window is designed to be a cure period that will encourage payment of the underlying claim, and *avoid unnecessary bad faith litigation.*" *Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So.2d 1278, 1282 (Fla. 2000) (emphasis added).

4. The Complaint does not allege (and cannot allege) that the Plaintiff submitted the required notice to the Florida Department of Insurance and P&C.² The court in *Allstate Ins. Co. v. Clohessy*, held that a claim for bad faith must be dismissed under Florida law when the plaintiff has not averred in the complaint that it complied with the notice requirements of §624.155. 32 F.Supp.2d 1328, 1333 (M.D. Fla. 1998). In so holding, the *Clohessy* Court stated: "[t]he Florida legislature enacted a clear mandate in establishing the condition precedent. It is, without a doubt, a condition that must be satisfied in order for one to perfect the right to sue under the statute." *Id.* The Plaintiff's failure to comply with this condition precedent absolutely bars her claims for bad faith against P&C. *Id.* at 1333. (holding that "due to the failure of the defendants/counter-plaintiffs to comply with the specified condition precedent, *i.e.*, the failure to file notice with the Florida Department of Insurance, it is imperative that this Court dismiss the defendant/counter-plaintiffs' [claim for bad faith]."); *see also*, *Nowak v. Lexington*, 464 F. Supp. 2d. at 1252. Moreover, the Southern District of New York, in a diversity action, stated that if Florida law applied to the plaintiff's claim for bad faith, it must fail under §624.155 because: "[plaintiff's claim for bad faith] is facially deficient in that [plaintiff] failed to prove, or even allege, that it satisfied the condition precedent for actions brought pursuant to the relevant provisions of that law, *i.e.*, 60 day's written notice of the violation to the insurer." *Commercial*

² Moreover, it is not sufficient for the plaintiff to put the insurance company on notice of a potential claim for bad faith through correspondence or other means of communication. Instead, it is an absolute requirement that the plaintiff file a civil remedy notice (CRN) with the Florida Department of Insurance and the insurance company before pursuing a claim for bad faith. *See Nowak v. Lexington*, 464 F. Supp. 2d 1248, 1252 (S.D. Fla. 2006).

Union Ins. Co. v. Flagship Marine Services, Inc., 982 F. Supp. 310 (S.D.N.Y. 1997). Therefore, the Plaintiff's claims for bad faith against P&C must be dismissed with prejudice because the Plaintiff did not comply with the condition precedent in §624.155.

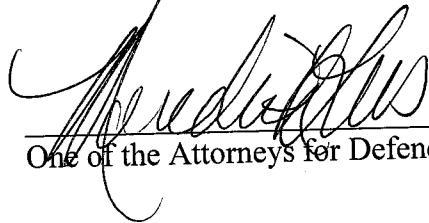
5. Alternatively, the Plaintiff's claims for bad faith must be dismissed without prejudice because these claims are premature and not ripe for adjudication. It cannot be disputed that to establish a *prima facie* case of bad faith the Plaintiff must prove: (1) the existence of liability and (2) the extent of damages. See *Vest v. Travelers Ins. Co.*, 753 So.2d 1270 (Fla. 2000); *Brookins v. Goodson*, 640 So.2d 110 (Fla. Dist. Ct. App. 1994); *Vanguard Fire and Cas. Co. v. Golmon*, 955 So.2d 591, 594 (Fla. Dist. Ct. App. 2006). Further, "absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for [] bad faith." *Blanchard v. State Farm Mut. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991). Here, the Plaintiff has not established the extent of her damages or liability on the part of the uninsured tortfeasors, who are not parties to this action. In fact, the Complaint vaguely alleges that the Plaintiff suffered various personal injuries caused by the tortfeasors, but does not allege the extent of those injuries or that these injuries exceed available coverage for the tortfeasors. Therefore, the Plaintiff's claims for bad faith in failing to pay uninsured motorist benefits are premature and due to be dismissed. *Progressive Select Ins. Co. v. Shockley*, 951 So.2d 20, (Fla. Dist. Ct. App. 2007).³

6. Based on the allegations in the Complaint, the Plaintiff can only maintain a claim against P&C for under-insured benefits.

³ If Alabama law was determined to apply, the Plaintiff's claims must also be dismissed. *Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So. 2d 557 (Ala. 2005) (holding that "[w]ithout a determination of whether liability exists on the part of the underinsured motorist and the extent of the plaintiff's damages, a claim for bad faith failure to pay or breach of contract is premature. The trial court properly dismissed the claims because the claims were not ripe for adjudication.). See also *LeFevre v. Westberry*, 590 So. 2d 154, 158 (Ala. 1991) (holding that "there can be no breach of an uninsured motorist contract, and therefore no bad faith, until the insured proves that he is legally entitled to recover.").

WHEREFORE PREMISES CONSIDERED, Defendant Property and Casualty Insurance Company of Hartford respectfully requests that the Court enter an Order dismissing **with** prejudice the Plaintiff's claims for bad faith breach of contract for failure to comply with the condition precedent in §624.155, or in the alternative, to dismiss **without** prejudice the Plaintiff's claims for bad faith and breach of contract as those claims are not ripe for adjudication, with leave for the Plaintiff to amend the Complaint to properly plead a claim for underinsured motorist benefits.

Respectfully submitted this the 19th day of July, 2007.



One of the Attorneys for Defendant

Of Counsel:

Bert S. Nettles ASB-5850-S63B

Brennan C. Ohme ASB-8419-M70B

Meredith Jowers Lees ASB-8103-M71J

HASKELL SLAUGHTER & YOUNG, L.L.C.

2001 Park Place North

1400 Park Place Tower

Birmingham, Alabama 35203

(205) 251-1000

(205) 324-1133 (FAX)

bsn@hsy.com

bco@hsy.com

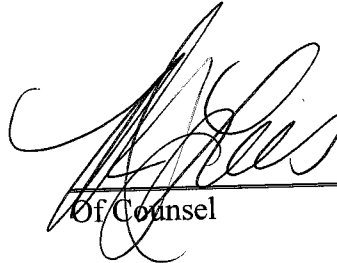
mjl@hsy.com

CERTIFICATE OF SERVICE

I certify that on July 19, 2007, a copy of the foregoing was served in the manner indicated below on the following counsel of record:

Mr. Dan Talmedge
MORRIS, CARY, ANDREWS,
TALMEDGE & JONES LLC
P.O. Box 1649
Dothan, Alabama 36302

☐ by Hand Delivery
☒ by U.S. mail properly addressed and postage pre-paid
☐ by facsimile transmission
☐ by PACER electronic filing



Of Counsel

EXHIBIT A

POL #55PHH964253 PROD 334108 REQ CD ROM RE R
 INSD DAVIS, FRANCES POLICY PROCESS DT 010405
 ADDR P O BOX 71 RATE TABLE DT 110204
 CITY CHIPLEY ST FL ZIP 32428-0071 HBB
 POL TERR 075 COUNTY OVRD ZIP -

SUB SHT CO PLAN ST EFF EXP TERM INST PF RNST A/C RI STAT LAPSE IND PLAN
 DAV P 1 FL 021905 021906 12 1 A 2000

---TABS--- BILL PHSE ORIG RNL CHG TRANS AARP
 ACCT NO PLAN METH CD POL DT TX CD CDT ACT CH# EFF DT DT PROC MEMB
 84012734 MO 1 01 021904 9000 CHG 01 052105 062405 Y

LTERM PCANCCDE STATE EXCEPTION N RSN REAPP
 CR MVR CRT NO POL #/FORM COMPANION POL# POL U/W CRU CLUE PC BKT#
 C S 8509

PREVIOUS: POL # PROD CO POL PLAN STATE RET COM CR ST BOOKLET
 55PHH964253 334108 P FL N

FUTURE: POL # PROD SUB CO POL PLAN ACCT NO PLAN METH
 NR CODE P/L QUAL CODE

AUTO 1 GARAGE 718 ORANGE SCHIPLEY ST FL ZIP 32428-2148 OVRD ZIP
 AUTO GARAGE ST ZIP OVRD ZIP

POL PKG ENH CD: HOMESHP DWG CD: RES OCCPY YR CNT:

SCORE REASON CODES: NO HIT ORDER DATE: 02/04MODEL: V
 INET CR IND N MTR CLB CR N ADV ISS N

--- LOSS PAYEE/LESSOR INFO ---
 **** NO LOSS PAYEE INFO FOR THIS POLICY ****

----- AUTO INFO -----

AUTO # YR MAKE MDL/BODY VIN VIN DT N PURCH MAKE
 1 98 TOYOT CAMRY CE/LE/XLE JT2BG22KOW0142476 A VER PRCH U PRICE TYPE CD
 PP 62

AUTO RATE DAYS/MILE CAR VIN L PD DDC IPO GS FZN
 # TERR CLASS WEEK/WORK POOL USE SYM BYF PERF P SUR CR LSR SUR CR AGE
 1 075 C262AJ P E N

AUTO ANTI SEAT AIR FULL ANN FUTUR -PREVIOUS-- --CURRENT-- INSP
 # THFT BELT BAG ABS DRL GLASS MLGE MLGE ODM DATE ODM DATE INFO
 1 A B B 10000 049000 1099 091000 0204

AUTO MTHM MTHM/TRLR MTHM RV RV ROUND 4 RSA PS HAZ ENGCC MCYCLE
 # LGTH RESID LAYUP ASSOC APPLD MODIFIER APPLD EXCL SIZE DRVR
 1 N

AUTO# BI/PD SYM MED/PIP/UM SYM
 1

----- DRIVER INFO -----

NAME DOB MS SEX OCC LIC # DT LIC
 1 DAVIS, FRANCES 111142 W F LPN D120247429110 FL 111158

-STATE SPECIFIC-

DRV P % L D G DEF ADV SCH MCYCLE AGE DVR RET 3YR MVR MVR
 CAR O USE D T S DRV DT DDC 100+ DDC DT INC PTS CR MVR CD AGE IPO ACC CONV SPD
 1 X 0 Y 1

DRIV OVER 5 = YR PT FR = TOT SDI = # ACC = # CONV = INEXP PO =
 IFC = SDF = AVD = FR-SUR = FR-NC = SPEED =

DRIVER EXT EXT NON PREMIUMS
 # NON BI PD MED
 1

AD+D AD+D PREM O/R
 I II III IV I+II III+IV VEHS
 1

----- TIERING INFO -----

NO INC INCEPT CAPPED SCORE MODEL: V SS# IND: N
 INSUR SCORE: W7
 VEH# TIER TIER TIER TIER
 1 A2
 2
 3
 4

----- SDIP INFO -----

YEARS --INCIDENT COUNTS AND AGE IN MONTHS (3 YEAR STATE)--
 DVR DRV CLEAN MAJ-CNV MIN-CNV AF-ACC NCAF-ACC NAF-ACC
 # VEH (0-5) CNT AGE CNT AGE CNT AGE CNT AGE CNT AGE
 1 1 5 0 00 0 00 0 00 0 00 0 00
 2
 3
 4
 5

YRS INCID FREE: 00
 LONG INCID: 00

----- COVERAGES -----

LIMITS	PREMIUMS BY AUTO			
	1	2	3	4
BI 25/ 50	\$ 104.00	\$	\$	\$
PD 25	\$ 69.00	\$	\$	\$
PAS HAZ	\$	\$	\$	\$
MED	\$	\$	\$	\$
UM * 25/ 50	\$ 55.00	\$	\$	\$
ADDTL CHG INC LIMITS	\$ 26.00	\$	\$	\$

* - (UM LIMITS ARE STACKED)

PDBUYBACK
 NO FAULT

FL FULL INS/HH; WKLS XT PIP

	PREMIUMS BY AUTO			
	1	2	3	4
PIP	\$ 97.00	\$	\$	\$
ADD PIP				

INC FMLY #
 (BPP PIP 1 DPD ----- FOR SYSTEMS USE)

	LIMITS BY AUTO					PREMIUMS BY AUTO			
	1	2	3	4		1	2	3	4
NON COLL	500				\$	35.00	\$	\$	\$
COLL	500				\$	114.00	\$	\$	\$
STATED									
AMOUNT									
CUSTOMIZED									
NON COLL					\$		\$	\$	\$
COLL					\$		\$	\$	\$
STA AMT					\$		\$	\$	\$
LOAN/LEASE COV COMP					\$		\$	\$	\$
LOAN/LEASE COV COLL					\$		\$	\$	\$
NAC N									

PGM ELIG =ZFORGV =ZEARN DIS DED 0

NCRF LOSS RECOUP/ALLOC
NCRF CLEAN RISK RECOUP/ALLOC

	LIMITS BY AUTO					PREMIUMS BY AUTO			
	1	2	3	4		1	2	3	4
T & L	050				\$	6.00	\$	\$	\$
EXCESS SOUND					\$		\$	\$	\$
AUDIO/VISUAL					\$		\$	\$	\$
TAPES ONLY					\$		\$	\$	\$
TRANSP EXP	020				\$	INCL	\$	\$	\$
CPL COV					\$		\$	\$	\$
SPEC PERIL					\$		\$	\$	\$
TOTAL PREMIUM BY AUTO					\$	506.00	\$	\$	\$

PERSONAL UMBRELLA
OTHER ENDT PREMIUM \$ 367.00-
FULL TERM PREMIUM \$ 506.00 PROPOSED HOMEOWNER ACCT CR \$ 35.00

----- ENDORSEMENTS -----

ENDT A4506 0 A4832 1 A5750 1 A5884 1 A5579 2 A5906 0